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Standing for State and Federal Legislators

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COMMENTS

STANDING FOR STATE AND FEDERAL LEGISLATORS

I. INTRODUCTION

Under the general heading of subject matter jurisdiction lies the concept of justiciability.[1] Justiciability contains four main components: ripeness, mootness, political question, and standing.[2] Each is a threshold issue,[3] requiring an independent judicial analysis.[4] Should a plaintiff fail to meet the necessary test for any one of the four, a federal court lacks subject matter jurisdiction to consider the merits of the case.[5] Where standing and political questions are presented in a single case, standing should be considered first.[6]

Standing has been called the "most widely discussed and debated of the judicially created doctrines of justiciability."[7]

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1. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-7 (1978 & Supp. 1981).

2. *Id.* at §§ 3-9 to 3-17.

3. *See* 6A J. MOORE, MOORE'S FEDERAL PRACTICE AND PROCEDURE, ¶¶ 57.11 - 57.15 (2d ed. 1979 & Supp. 1981).

4. *Id.*

5. Gladstone, Realtors v. Bellwood, 441 U.S. 91 (1979) (standing); Buckley v. Valeo, 424 U.S. 1 (1976) (ripeness); Baker v. Carr, 369 U.S. 186 (1962) (political question); Atherton Mills v. Johnson, 259 U.S. 13 (1922) (mootness).

6. American Jewish Congress v. Vance, 575 F.2d 939 (D.C. Cir. 1978); Warth v. Seldin, 422 U.S. 490, 498 (1974) (dicta); *see also infra* note 42.

7. J. RADCLIFFE, THE CASE-OR-CONTROVERSY PROVISION 186 (1978). In Flast v. Cohen, 392 U.S. 83 (1968), Justice Harlan, in his dissent, characterized standing as a "word game played by secret rules." *Id.* at 129. *See also* L. TRIBE, *supra* note 1, § 3-18, at 81. To illustrate the difficulty and confusion of its status in American law, here are two examples of an attempt to find a definition for standing:

> In legal usage, "standing" is basically a means by which courts can accept or refuse jurisdiction, and it generally alludes to the capacity of a party to obtain judicial relief of an administrative action. The term "standing" should not be confused with the doctrine of standing to sue; the latter doctrine is generally directed towards the capacity of a plaintiff to present his case before a district court ab initio.

81A C.J.S. *Standing* at 255-56 (1977) (footnotes omitted). The dictionary provides no

This comment will analyze the standing problems unique to those plaintiffs suing in their capacity as elected state or federal legislators.[8] While legislators[9] need only meet the same standard required of all citizens,[10] particular problems exist because of the unique nature of the status upon which legislators assert their standing to sue. As a result, several judicial tests have been developed to deal with the type of legislative injury alleged. Just as the generalized test for standing has changed over the years,[11] the standing tests for legislators have evolved and adapted to the changes in the more generalized test. These tests lack clear and consistent application by the courts. The lack of consistency is due, at least in part, to the failure of the Supreme Court to hear a standing case with a legislative plaintiff in over a decade.[12] It appeared that the

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definition for standing, outside of common usages, but does define "standing to sue."

> "Standing to sue" means that a party has sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy. Standing is a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court. The requirement of "standing" is satisfied if it can be said that the plaintiff has a legally protectible and tangible interest at stake in the litigation.

BLACK'S LAW DICTIONARY 1260 (rev. 5th ed. 1979) (citations omitted). The dictionary has blended the two ideas. For purposes of this comment, "standing to sue" is synonymous with "standing."

8. It has been noted that such an action is a necessary check on the executive branch of government. Comment, *Congressional Standing to Challenge Executive Action*, 122 U. PA. L. REV. 1366 (1974). Indeed, the Court has stated that its decisions often "[affect] the relationships between the co-equal arms of the National Government [and that] the effect is . . . most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch." Valley Forge Christian College v. Americans Unified for Separation of Church & State, 454 U.S. 464, 473 (1982) (warning that this very result also calls into question the "continued effectiveness of the federal courts in performing that role.") *Id.* It should be emphasized, however, that the legislative branch is itself subject to being checked by legislators. *See, e.g.*, Powell v. McCormack, 395 U.S. 486 (1968).

9. For purposes of this comment, "legislator" will be used to describe United States representatives from both houses of Congress, and to describe members of any house of the various state legislatures. Additionally, instances where candidates for legislative office are suing, or where certain legislators are appointed by the entire legislature to represent it in court, are also designated "legislator" cases; however, cases arising from these latter two situations will not be discussed. *See* Schiaffo v. Helstoski, 492 F.2d 413 (3d Cir. 1974) (candidate); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974) (selected legislators representing the legislature or an official legislative body).

10. Harrington v. Bush, 553 F.2d 190, 204 (1977).

11. Tucker, *The Metamorphosis of The Standing to Sue Doctrine*, 17 LAW F. 911 (1972).

12. *See infra* note 69 and accompanying text. *See also infra* note 72.

Court might shed light on this area, however, after it granted certiorari to a federal district court case, *Idaho v. Freeman*,[13] in which legislators were implicitly found to have standing to challenge ratification of the Equal Rights Amendment. Unfortunately, the issue became moot because the deadline for ratification passed.[14] Because the Amendment has again been submitted to the state for ratification,[15] section IV of this comment will attempt to predict the outcome of a Court decision on the standing issue should a factual situation analogous to that in *Idaho v. Freeman* arise again. This prediction will be based upon the current status of the tests for legislative standing. Suggestions for improving the tests will also be proposed.

II. HISTORICAL DEVELOPMENT OF STANDING IN FEDERAL COURTS

The word "standing" is a recent addition to American legal jargon.[16] It appears to have its origins in the English parliamentary practice of allowing only those "[o]pponents of legislative proposals . . . or 'interests' [who] were 'directly and specially affected . . .' "[17] to be heard.

The English requirement of a legal interest in a dispute eventually found its way into American courts.[18] Because of

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13. 529 F. Supp. 1107 (D. Idaho 1981).

14. 103 S. Ct. 22 (1982).

15. San Jose Mercury News, January 25, 1983, at B13, col. 1.

16. J. VINING, LEGAL IDENTITY 55 (1978).

17. *Id.* at 55-56. This procedure of establishing the right to be heard was eventually formalized. An opponent who could be heard was said to have *locus standi.* The legislative requirement later became a judicial requirement, even though jurisdiction in the English courts was initially determined by writ and not by standing.

18. *Id.* The first appearance of the word standing in American law has been traced to a headnote in the 1903 United States Supreme Court case of Davis & Farnum Mfg. Co. v. Los Angeles, 189 U.S. 207 (1903). Another authority points out that injury or damage was a prerequisite to being heard by a federal court as early as 1863, although the term itself was not used. Mississippi & Mo. R.R. v. Ward, 67 U.S. (2 Black) 485 (1863). It is generally agreed, however, that Frothingham v. Mellon, 262 U.S. 447 (1923), marks the "point at which the Court began to pay particular attention to the interest of the plaintiff in the matter sought to be adjudicated." Note, *Standing to Sue For Members of Congress*, 83 YALE L.J. 1665, 1668 (1974). See *id.* at 1667 for a refutation of the assertion that *Frothingham*, marks the point at which standing entered American law, pointing out that the word was never used in the case. *See also* Tucker, *The Metamorphosis of the Standing to Sue Doctrine*, 17 LAW F. 911, 913 (1972). *But cf.* Burger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818-19 (1969) (asserting that *Frothingham* was first). Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1950), has

the legal interest requirement, standing "differs from all of the other elements of justiciability by focusing primarily 'on the *party* seeking to get his complaint before a federal court' and only secondarily 'on the *issues* he wishes to have adjudicated.' "[19] Despite this focus on the individual, judicial treatment of standing has been accused of often being a blending of standing, ripeness, and mootness.[20] "Much of the law of ripeness and mootness can be viewed as simply a convenient way of expressing particular aspects of standing concerns."[21]

A. *Article III: The Source of the Case or Controversy Requirement*

The scope of federal court jurisdiction is governed by article III of the Constitution.[22] The courts are limited to only reviewing cases in which a genuine case or controversy exists.[23] The case or controversy provision is generally seen as

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been labeled the Supreme Court's first comprehensive discussion of standing. *See* J. RADCLIFFE, *supra* note 7, at 187-88.

19. L. TRIBE, *supra* note 1, § 3-17 at 79 (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)) (emphasis added by Tribe).

20. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3531, at 230-33 (1975 & Supp. 1981) [hereinafter cited as WRIGHT & MILLER], (citing Laird v. Tatum, 408 U.S. 1 (1972)); O'Shea v. Littleton, 414 U.S. 488 (1974).

21. WRIGHT & MILLER, *supra* note 20, at 232.

22. The pertinent part is set out below:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
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> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
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> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed.

U.S. CONST. art. III, § 2 [hereinafter cited as article III].

23. WRIGHT & MILLER, *supra* note 20, § 3521, at 236; *see also* Simon v. Eastern

having four parts: 1) adversity; 2) parties with an interest in a disputed legal right; 3) an issue susceptible to adjudication at the present time; and 4) finality.[24] The use of the article III requirement "of factual or concrete injury serves only to limit the ability of federal courts to confer standing in the absence of [a] statute"[25] and enables the courts to quickly "resolve disputes involving only generalized grievances, or involving only the rights or interests of third parties."[26]

Even Congress may not expand federal court jurisdiction beyond article III.[27] In *Marbury v. Madison*,[28] the Court relied on the clear language of article III prohibiting the expansion of the Court's original jurisdiction.[29] The Court has been steadfast in resisting Congressional attempts to expand the article III jurisdictional limitation. In *Trafficante v. Metropolitan Life Insurance*,[30] the Court held that Congress may grant standing rights statutorily, but only to the extent that those rights are within the parameters established by article III.[31]

Ky. Welfare Rights Org., 426 U.S. 26, 39 (1975).

24. J. RADCLIFFE, *supra* note 7, at 43.

25. L. TRIBE, *supra* note 1, at 80. It is also important to view federal courts as courts of limited jurisdiction and state courts as courts of general jurisdiction. WRIGHT & MILLER, *supra* note 20, at 44-45.

26. L. TRIBE, *supra* note 1, § 3-19, at 82. Article III is not the sole source for federal court jurisdiction. Removal jurisdiction is not expressly permitted by article III or by any other provision in the Constitution. *See* 28 U.S.C. § 1441 (1976). Removal jurisdiction has been found to be an appropriate use of the congressional power to make laws "necessary and proper" for carrying out the tasks delegated to the national government. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816). The article III requirement does influence removal jurisdiction because the case removed must be one which could have been brought in federal court initially. A second exception to article III limitations is ancillary or pendant jurisdiction. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978). Jurisdiction is premised on judicial economy and procedural convenience. WRIGHT & MILLER, *supra* note 20, § 3521, at 39.

27. The case most famous for this principle is Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (finding a jurisdictional limitation upon the federal courts despite a statute appearing to grant unlimited jurisdiction). *See also* WRIGHT & MILLER, *supra* note 20, § 3521, at 37; L. TRIBE, *supra* note 1, § 3-7, at 52.

28. 5 U.S. (1 Cranch) 137 (1803).

29. WRIGHT & MILLER, *supra* note 20, § 3521, at 38.

30. 409 U.S. 205 (1972).

31. *Id.* at 209. This limitation was cogently stated by the Court, in another case, as follows: "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.' *Warth v. Seldin*, 422 U.S., at 501. In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself,' *ibid.*, that is likely to be redressed if the requested relief is granted. *Simon* v. *Eastern Ky. Welfare Rights Org., supra* at 38."

B. *The Modern Two-Prong Test*

Frothingham v. Mellon[32] was the Supreme Court's first major elaboration of the modern constitutional aspect of standing, requiring that the focus be on the plaintiff's alleged injuries. In *Frothingham,* consolidated for review with *Massachusetts v. Mellon,*[33] the term "standing" was never used; however, the Court clearly addressed the constitutional element of standing as it is known today.[34] The next major case involving standing was *Baker v. Carr*[35] in which the Court reemphasized the injury requirement which a plaintiff must demonstrate in order to satisfy article III.[36] *Baker* requires that the injury suffered by the plaintiff be such that it focuses the court's attention to that particular plaintiff, and not merely to a claim shared equally by all citizens.[37] *Baker* is

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Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1978).

For additional cases dealing with congressional augmentation of standing in statutes, see the cases listed in WRIGHT & MILLER, *supra* note 20, § 3531, at 235 n.9. *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 73 (1st ed. 1978).

For an argument that article III was not a separately articulated standing requirement prior to *Frothingham,* and that this is the better test, see Note, *Standing to Sue for Members of Congress, supra* note 18, at 1673-74. Of course, the additional question of whether the plaintiff is a party within the group of individuals to whom Congress intended to grant standing under the statute remains one with which the courts must deal; *see* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 100, 100-01 (1978).

32. 262 U.S. 447 (1922). *See supra* note 18.

33. 262 U.S. 447 (1922).

34. *Id.* at 480. The Court was specifically discussing the injury requirement of article III in *Frothingham:* "We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." *Id.* at 488. *Cf.* Flast v. Cohen, 392 U.S. 83, 93 (1967) (Chief Justice Warren argued that policy reasons, not just constitutional considerations, decided the case. However, later in the case he conceded that the two are often indistinguishable). *Id.* at 97.

35. 369 U.S. 186 (1962) (because Tennessee voters alleged that their votes for the General Assembly were debased because of the reapportionment scheme, standing was allowed). *See* Note, *supra* note 18, at 1668.

36. "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing." 369 U.S. at 204.

37. As the *Baker* Court stated:

> If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," Coleman v. Miller, 307 U.S. at 438, not merely a claim of "the right possessed by every citizen to require that the Government be adminis-

often the starting point for reviewing modern standing requirements because the fundamental requirements articulated in *Baker* have not changed.[38]

Standing requirements were again re-evaluated by the Court in *Flast v. Cohen.*[39] Like *Frothingham, Flast* also involved a plaintiff suing in the capacity of taxpayer. The *Flast* court developed a test to determine whether a plaintiff had alleged a sufficient personal stake, and whether the taxpayer's interests "impart[ed] the necessary concrete adverseness"[40] in order to be reviewed by a federal court. This test is known as the "logical nexus" test because the plaintiff must show "a logical nexus between the status asserted and the claim sought to be adjudicated."[41] The test has two parts: "First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked . . . . Secondly, the taxpayer must establish a nexus between that status and

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tered according to law . . . ." Fairchild v. Hughes, 258 U.S. 126, 129. 369 U.S. at 208. In *Frothingham,* the presence of such a claim prevented standing. *See supra* notes 33-34 & *infra* note 39 and accompanying text.

38. Comment, *supra* note 8, at 1369. *See* Idaho v. Freeman, 507 F. Supp. 706 (D. Idaho 1981). *See also* Markham, *Standing In The Political Arena,* 45 ALB. L. REV. 932, 934 (1981).

39. 392 U.S. 83 (1968). *See supra* notes 18 & 34. In *Flast,* Chief Justice Warren, aware of existing criticism and confusion about the Court's articulation of a standing test, sought to clarify the standing requirements:

> [*Frothingham*] has been the source of some confusion and the object of considerable criticism. The confusion has developed as commentators have tried to determine whether *Frothingham* establishes a constitutional bar to taxpayer suits or whether the Court was simply imposing a rule of self restraint which was not constitutionally compelled.

Id. at 92. The Court first determined that article III was not an absolute bar to "suits by federal taxpayers." *Id.* at 101. Article III was found to be a limitation on federal court jurisdiction only to the extent that it assures that the "dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* This broad language was reduced further to the question of whether the plaintiff has a " 'personal stake in the outcome of the controversy' [citations omitted] and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.' " *Id.* (quoting Baker v. Carr, 369 U.S. 186, 204 (1962), and Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)).

The *Flast* test is the strongest precedent in cases where the plaintiff asserts standing based on his status as a taxpayer since the plaintiff's status focuses the court's inquiry into the test to be applied: "the various rules of standing applied by the federal courts have not been developed in the abstract. Rather, they have been fashioned with special reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated." 392 U.S. at 101.

40. 392 U.S. at 101.

41. *Id.* at 102.

the precise nature of the constitutional infringement alleged."[42]

In a pair of cases following *Flast*, the Court adapted the *Flast* test to plaintiffs who alleged a status other than that of taxpayer. In both *Barlow v. Collins*[43] and *Association of Data Processing Service Organizations, Inc. v. Camp*,[44] the plaintiffs sued in their capacity as private citizens challenging administrative action. Standing was found in both cases, a result which prompted one commentator to declare that the cases marked a new era of liberalized standing requirements.[45] Although the Court's reasoning was similar in both cases, *Data Processing* came to represent the restatement of the two part *Flast* test as it applied to nontaxpayer suits.[46] The two prong test,[47] or two tier test as it is sometimes referred to,[48] requires that the plaintiffs first allege that they have suffered an "injury in fact, economic or otherwise,"[49] and second, that plaintiffs allege that they are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[50]

Later cases continued to refine and articulate the requirements of both prongs. Today, prong one is still the constitu-

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42. *Id.* The Court made two additional points about standing. First, "it is not relevant that the substantive issues in the litigation might be nonjusticiable." *Id.* at 101. This indicates that, where other possible justiciability challenges to a plaintiff's claim are made, standing should be considered first. *See* American Jewish Congress v. Vance, 575 F.2d 939, 943 (D.C. Cir. 1978) (deciding standing before political question); *see also supra* note 6. Second, the Court stated that "it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." 392 U.S. at 101-02. This indicates that the merits may be considered, at least minimally, for purposes of article III standing. *See* United States v. Richardson, 418 U.S. 106 (1974). The most recent decision by the Court on the issue of taxpayer standing involved alleged violations of first amendment rights. Valley Forge Christian College v. Americans United For Separation of Church & State, 454 U.S. 464 (1982).

43. 397 U.S. 159 (1970).

44. 397 U.S. 150 (1970). Discussions of this case can be found in the following: *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 177, 182 (1970) (calling the *Data Processing* test vague); Jaffee, *Standing Again*, 84 HARV. L. REV. 633 (1970); Young, *Review of Supreme Court Decisions*, 56 A.B.A. J. 482 (1970); Comment, *Standing for Review of the Actions by Federal Administrative Agencies: A New Test*, 23 U. FLA. L. REV. 206 (1970).

45. Markham, *Standing In The Political Arena*, *supra* note 38.

46. Comment, *supra* note 8, at 1370.

47. *Id.*

48. Markham, *supra* note 38, at 933.

49. 397 U.S. at 152.

50. *Id.* at 153.

tional or "case or controversy" prong. It contains four subrequirements.[51] The plaintiff must have suffered an injury in fact[52] which is fairly traceable to,[53] and caused by,[54] the defendant's acts or omissions.[55] The injury must be one which is redressable by a favorable court decision.[56] This constitutional prong presents the "mimimum constitutional mandate" for standing.[57] Even if the requirements of prong two are met, standing will not be granted unless prong one is also satisfied.[58] When met, prong one assures that the plaintiff has " 'alleged such a personal stake in the outcome of the contro-

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51. *See* Note, *Congressional Access To The Federal Courts*, 90 HARV. L. REV. 1632, 1635 (1977). *See also* Harrington v. Bush, 553 F.2d 190, 205 n.68 (1977). *But see* Idaho v. Freeman, 507 F. Supp. 706 (D. Idaho 1981) (calling prong one a three part test because redressability and tracing may be found in the alternative). *See infra* note 53.

52. Valley Forge Christian College v. Americans for Separation of Church & State, 454 U.S. 464 (1982). The injury may be actual or threatened. *Id.* at 472; Warth v. Seldin, 422 U.S. 490, 499, 501 (1975) (quoting Data Processing Service Org., Inc. v. Camp, 397 U.S. 150 (1970)); Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973); Data Processing Service Org., Inc. v. Camp, 397 U.S. 150, 151-54 (1970). The injury may be economic or noneconomic in nature. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 262-63 (1976); Sierra Club v. Morton, 405 U.S. 727, 734 (1971). And if monetary, the amount need not be substantial. United States v. SCRAP, 412 U.S. 669, 686-87 (1972). *See also* Markham, *supra* note 38, at 953-54 (arguing that under *SCRAP*, loss of even a single vote in an election should be sufficient). The injury must also be one which is suffered directly by the plaintiff, and not merely his abstract concern about a problem of general interest. *Arlington Heights*, 429 U.S. at 263; *Sierra Club*, 405 U.S. at 739-40. The Court referred to this requirement as one in which the "language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums." *Valley Forge*, 454 U.S. at 473.

53. Valley Forge Christian College v. Americans United For Separation of Church & State, 454 U.S. 464, 471-76 (1982); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1975); Oshea v. Littleton, 414 U.S. 448, 498 (1974); Linda R. S. v. Richard D., 410 U.S. 614, 617 (1973).

54. Valley Forge Christian College v. Americans United For Separation of Church & State, 454 U.S. 464, 472 (1982); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 261; Warth v. Seldin, 422 U.S. 252, 505 (1975). *But see* L. TRIBE, *supra* note 1, § 2-21 at 92-97 (criticizing the inclusion of the causation element in the constitutional minimum). *See also* Freeman v. Seldin, 507 F. Supp. 706 (stating the causation requirement to contain both redressability and tracing, so that a finding of either is sufficient to satisfy the test).

55. Valley Forge Christian College v. Americans United For Separation of Church & State, 454 U.S. 464, 472 (1982).

56. *Id.* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38-39 (1975); Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 222 (1974). *See also* L. TRIBE, *supra* note 1, § 3-10, at 56.

57. Warth v. Seldin, 422 U.S. 490, 499 (1975).

58. Gladstone, Realtors v. Bellwood, 441 U.S. 91, 100 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1975).

versy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[59]

Prong two remains the nonconstitutional prong and has been expanded considerably beyond the original concept of zone of interests. Its focus continues to be the prudential considerations of self restraint by which the court limits its jurisdiction.[60] The plaintiff must show that his interests and legal rights have been injured, not those of third parties.[61] In addition, the plaintiff must show that his grievance is not so abstract that it is better addressed "in the representative branches of government,"[62] and that his injuries fall within the zone of interests protected by the statute or constitutional guarantee upon which his claim is based.[63] When the require-

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59. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1975) (quoting Warth v. Seldin, 422 U.S. 490, 498-99 (1975)).

60. Valley Forge Christian College v. Americans United For Separation of Church & State, 454 U.S. 464, 471-76 (1982).

61. *Id.* at 471-72; Warth v. Seldin, 422 U.S. 490, 499-500 n.12 (1975); Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 152-53 (1970); Singleton v. Wulff, 428 U.S. 106, 112 (1975).

62. Valley Forge Christian College v. Americans United For Separation of Church & State, 454 U.S. 464, 475 (1982). *See also* Warth v. Seldin 422 U.S. 490, 500 (1975); Schlesinger v. Reservists to Stop The War, 418 U.S. 208, 222 (1974).

63. Valley Forge Christian College v. Americans United For Separation of Church & State, 454 U.S. 464, 475 (1982). As noted in the text, the "zone of interests" requirement originated in the *Data Processing* decision and encompassed the entire prong two analysis at that time. Data Processing Service Org., Inc. v. Camp, 397 U.S. 150, 152-53 (1970). In fact, as recently as 1978, one scholar isolated the two levels of analysis used by the court in standing cases. Of the two levels, prong two was limited to the zone of interests test. L. TRIBE, *supra* note 1, § 3-17, at 79-80.

At the same time, however, other scholars were asserting that the *Data Processing* standard itself applied only in cases where standing was alleged under a statute, and therefore founded upon a nonconstitutional claim. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 31, at 73-76 (applying the two part test but arguing that *Warth* and *Trafficante* illustrate the standard to be used in constitutionally based injuries). *Contra* L. TRIBE, *supra* note 1, at 80 n.4. The position of Professor Tribe appears to be correct. References to *Data Processing* and the "zone of interest" test have consistently been made by the Court in subsequent cases involving constitutionally based standing. *Valley Forge*, 454 U.S. at 475; Gladstone, Realtors v. Bellwood, 441 U.S. 91, 100 n.6 (1979).

For other cases referring to the zone of interests analysis in statutory as well as constitutional cases, see Rakas v. Illinois, 439 U.S. 128, 139-40 (1978); United States v. Richardson, 418 U.S. 166, 196 n.18 (Powell, J., concurring); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 320 n.3 (1977); Singleton v. Wulff, 428 U.S. 106, 111-12 (1975); Investment Co. Inst. v. Camp, 401 U.S. 617, 641 (1970) (Harlan, J., dissenting). For an argument that the zone of interests analysis is entirely irrelevant to the issue of standing, see Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 235-37 (1974) (Brennan, J., dissenting). *See also* Simon v. Eastern Ky. Wel-

ments of prong two are met, the court will further balance these prudential considerations to determine whether standing should be granted.[64]

III. STANDING FOR LEGISLATORS

For purposes of standing, legislators receive no special treatment.[65] They must meet the general requirements outlined in the previous section. State legislators are generally afforded the same rights as federal legislators.[66] Legislators do, however, have interests which are different from those of the ordinary citizen.[67] To date, legislators have alleged three general areas of injury unique to their status: diluted vote, usurpation of legislative power, and diminished effectiveness in carrying out legislative duties absent a judicial declaration.[68] Each of these will be discussed separately, although it is not uncommon for more than one type of injury to be involved in a single case.

The voting injury is divided into two subcategories. One involves dilution of a past vote, and the other a dilution of a future vote. The courts have treated the two types of votes differently. For the most part, an alleged injury to a past vote survives the standing tests, provided the vote was on specific legislation. Alleging injury to a future vote has been generally

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fare Rights Org., 426 U.S. 26, 39 n.19 (1975) (statutory reference only); Passenger Corp. v. Passengers Ass'n, 414 U.S. 453, 469 (1973) (Douglas, J., dissenting); Blue Shield of Virginia v. McCready, 457 U.S. 465, 476 (1982) (statutory reference only).

For purposes of this comment, however, prong two will include all of the articulated prudential considerations, of which the zone of interests is but one. In addition, where the zone of interests analysis is applied, the *Data Processing* standard as well as those in *Trafficante* and *Warth* will be used.

64. Valley Forge Christian College v. Americans United For Separation of Church & State, 454 U.S. 464, 475 (1982).

65. Harrington v. Bush, 553 F.2d 190, 204 (D.C. Cir. 1977).

66. Note, *supra* note 18, at 1665 n.2.

67. Reuss v. Balles, 584 F.2d 461, 465 (D.C. Cir. 1978).

68. Injury from a diminished vote is not unique to legislators. *See* United Jewish Org. v. Carey, 430 U.S. 144 (1977) (dilution of voting strength of nonwhites due to redistricting plan in racially polarized counties); Dunn v. Bumstein, 405 U.S. 330 (1972) (state durational residency requirements alleged to have illegally interfered with the right to vote of those residents involved in interstate movement); Kramer v. Union School Dist., 395 U.S. 621 (1969) (additional requirements for eligibility to vote in school board elections alleged unconstitutional); Wiley v. Sinkler, 179 U.S. 58 (1900) (city election officials' refusal to count citizen's vote in congressional election because voter had not registered); Creel v. Freeman, 531 F.2d 286 (5th Cir. 1976) (city residents' statutory grant allowing participation in county school board elections alleged as diluting votes of county residents).

unsuccessful for standing purposes because, as an injury, it is too speculative.

A. *Diluted Vote*

1. *Past Vote*

The case of *Coleman v. Miller*,[69] although decided in 1939, is sound precedent for determining the necessary requirements for legislative standing because the plaintiffs met both prongs of what would later become the modern test. In *Coleman*, twenty state senators from Kansas alleged that the effectiveness of their past votes against state ratification of the Child Labor Amendment[70] had been diluted by the voting procedure used by the state legislature. In answering the defendant's claim that the plaintiffs did not have an adequate interest to invoke federal court jurisdiction, the Court stated: "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes."[71] This finding satisfied prong one of the test as it is applied in legislator cases. The second prong was also satisfied: "Petitioners come directly within the provisions of the statute governing our appellate jurisdiction. They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect and the state court has denied that right and privilege."[72] This lan-

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69. 307 U.S. 433 (1939).

70. For the text of the proposed amendment see *Coleman*, 307 U.S. at 433 n.1. The vote on the amendment had resulted in a tie in the Senate. The lieutenant governor cast the tie-breaking vote, which allowed the amendment to be passed. The suit sought to prevent the defendant, Secretary of the Kansas Senate, from counting the tie-breaking vote, and to treat the amendment as if it had not been ratified.

71. *Id.* at 438.

72. *Id.* Of lesser importance is the Supreme Court case of Powell v. McCormack, 395 U.S. 486 (1969). *Powell* is usually characterized as a case most useful for its holdings on two other threshold questions: mootness and political question; generally the case is useful for its discussion of separation of powers. *Id.* at 495-500, 518-22. (mootness and political question). *See* G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS 451 (10th ed. 1980 & Supp. 1981) (separation of powers). *See generally Supreme Court, 1968 Term*, 83 HARV. L. REV. 62 (1969); Comment, *Congressional Exclusion: A Test of Judicial Supremacy—Powell v. McCormack*, 15 N.Y.L.F. 921 (1969); Comment, *Comments on Powell v. McCormack*, 17 U.C.L.A. L. REV. 1 (1969); Comment, *Limiting Judicial Review of Congressional Exclusion with the Political Question Doctrine*, 1969 UTAH L. REV. 182; Note, *Constitutional Law—Exclusion of Congressman Elect Who met all Constitutional Qualifications Deemed Unconstitutional*, 19 BUFFALO L. REV. 105 (1969) Note, *Congressional Exclusion of Member-Elect and the Political Question Doctrine*, 23 SW. L.J. 733 (1969). The alleged injury

guage is a clear application of the prudential zone of interests requirement.

Kennedy v. Sampson[73] is one of the most widely cited and better articulated decisions in this area.[74] A United States

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was not the result of the illegal activity of the executive branch, but was the result of the acts of the legislative body itself. This strengthens the idea that a legislator may suffer an injury not suffered by the legislative body as a whole. *See* Kennedy v. Sampson, 511 F.2d 430, 434-35 (D.C. Cir. 1974) (citing Sierra Club v. Morton, 405 U.S. 727 (1972) for the proposition that the party seeking standing need only be among the injured and not the most directly or seriously injured); Pressler v. Simon, 428 F.2d 302, 304 (D.D.C. 1974). *But see* Note, *supra* note 51, at 34-37 (considering the injury to be to the legislative institution which individuals share proportionally). Unfortunately, the *Powell* case has little helpful language for developing diluted vote as a basis of injury in fact.

Subsequent to *Powell,* the Supreme Court has written substantially only once on a case involving legislator standing. The case, Pressler v. Blumenthal, 434 U.S. 1028 (1978), received only a summary affirmance. The district court found the congressman to have standing to protect a future voting right, but dismissed the case on the merits. *See also* Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976). In *Pressler v. Simon* a United States congressman alleged that the procedure used to implement federal pay increases was illegal. Traditionally, Congress fixed the increases without presidential involvement, but in this case the President's recommendations were put into effect without congressional approval. The congressman's right to vote on the increases was protected by the Constitution. He was therefore able to meet both prongs of the modern test: injury through a lost vote protected by the Constitution. *See* U.S. CONST. art. I, § 1. Interestingly, the congressman alleged "not that the efficacy of his legislative vote was impaired by the Executive, but rather that his vote was impaired by the failure of other members of Congress to assume an affirmative responsibility specifically placed on them by language of the Constitution." 428 F. Supp. 302, 304. Unlike *Powell,* however, the defendant in *Pressler v. Simon* was the Secretary of the Treasury, not Congress itself. Further, there was no question of a failure to enact a law for which a congressman had already voted, or an illegal enactment as in *Coleman.* The case, therefore, represents a relaxing of standing requirements where a dimininshed vote is the alleged injury. It clearly involves a potential vote and the concept of usurpation of power.

In his concurring opinion, Justice Rehnquist pointed out that the decision affirming dismissal could just as easily have been based on lack of standing. As a result, he cautioned that the decision should not be read as an affirmance of the district court's holding. 434 U.S. at 1028-29. For similar conclusions involving two other cases, see Reuss v. Balles, 584 F.2d 461, 465 n.15 (D.C. Cir. 1978). *Cf.* 584 F.2d at 470 n.1 (Wright, J., dissenting); Holtzman v. Schlesinger, 484 F.2d 1307, 1308-12 (2nd Cir. 1973). This rule regarding threshold questions makes standing very confusing when a court unnecessarily decides the issue. *See also infra* note 89 (discussing *Reuss*). For additional discussion of *Holtzman v. Schlesinger,* see Note, *Constitutional Law—Justiciability—Veto Power—Standing, . . . Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973),* 15 HARV. INT'L. L.J. 143 (1974). Note, *War in Cambodia—Political Question?,* 38 ALA. L. REV. 245 (1974); Shatluck, *The "Political Question" Quagmire: War and Peace in the Second Circuit,* 40 BROOKLYN L. REV. 1031 (1974); Note, *Justiciability of Presidential War Power,* 48 ST. JOHN'S L. REV. 215, 309 (1974).

73. 511 F.2d 430 (D.C. Cir. 1974).

74. *See* Note, *supra* note 51, at 1640 (calling it a "prospective vote" case). *See*

senator alleged that the President's use of the pocket veto was illegal and, as a result, a bill for which the senator had voted did not become law. Judge Tamm, writing for a unanimous court,[75] applied alternate standing tests. First, applying the logical nexus test of *Flast,* he found the necessary nexus between the plaintiff's status as a senator and the defendant's illegal actions: "Disposition of the substantive issue will determine the effectiveness *vel non* of appellee's actions as a legislator with respect to the legislation in question. This demonstrates a relationship between appellee and his claim which is not only 'logical' but real . . . ."[76]

In the alternative, the modern test was also applied by the court. The nullification of the senator's vote fulfilled the injury-in-fact requirement of prong one.[77] The senator's interests were found to be within the zone of interests protected by the separation of powers doctrine of the Constitution.[78] This satisfied prong two of the test.[79] Two similar cases have arisen since this decision, and in both instances standing was granted on the same grounds as in *Kennedy v. Sampson.*[80]

Legislators have not been wholly successful in gaining standing where a past vote is involved. In one of several cases involving the war in Southeast Asia, *Harrington v. Schlesinger,*[81] four United States congressmen challenged the use of congressionally appropriated funds for the military effort.

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also Comment, *The Veto Power and Kennedy v. Sampson: Burning a Hole in the President's Pocket,* 69 NW. U.L. REV. 587, 601 (1974) (including a discussion of the use of the pocket veto in state governments as well as in the federal government).

75. Judge Fay wrote a concurring opinion which was joined by Judge Bazelon. 511 F.2d at 446.

76. *Id.* at 433. Note the taxpayer "nexus" terminology used by the court. *Cf.* Duke Power v. Carolina Envt'l Study Group, 438 U.S. 59, 79-80 (1978) (holding the *Flast* nexus requirement to be applicable only to taxpayer suits). *See also* 6A J. MOORE, MOORE'S FEDERAL PRACTICE AND PROCEDURE ¶ 57.11 n.99 (2d ed. 1979 & Supp. 1981).

77. 511 F.2d at 433-44.

78. U.S. CONST. art. 1, § 7. This section prevents overreaching by one branch of government into the prerogatives of the others.

79. 511 F.2d at 434, 436.

80. Under almost identical facts, the Ninth Circuit found that a senator from Guam had standing to challenge the use of the pocket veto by the governor. Bordallo v. Camacho, 520 F.2d 763 (9th Cir. 1975). In 1976, Senator Kennedy again challenged the use of the pocket veto. Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976). Citing only the prior *Kennedy* decision, Judge Sirica held that the Senator had standing. *Id.* at 355-56.

81. 528 F.2d 455 (4th Cir. 1975).

Among other allegations,[82] the plaintiffs alleged that they had voted for a law limiting military involvement in the war and that their votes were diluted by the continued use of funds for the war effort by the Secretary of Defense. The court rejected this argument and denied standing. It held that the congressmen could not "claim dilution of their legislative voting power because the legislation they favored [had already become] law."[83] In distinguishing *Kennedy v. Sampson,* the court stated: "once a bill has become law, [the congressman's] interest is indistinguishable from that of any other citizen."[84] This reasoning is a frequent means of limiting judicial intervention into the legislative-executive relationship where a past vote is involved and the legislation has already been effectively enacted. The theory is that the legislators fail to distinguish their interests from those of all citizens, a requirement of the constitutional prong expressly stated in *Baker.*[85]

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82. The Congressmen also alleged that the judicial determination was necessary to enable them to effectively perform their other congressional duties. *Id.* at 455, 459.

83. *Id.* at 459.

84. *Id.*

85. *See supra* note 37 and accompanying text. Under the dicta of *Valley Forge,* however, it could equally be argued that this constitutes a generalized grievance falling under prong two of the test. Since the legislator's interests are indistinguishable from those of every citizen, their remedy lies also with the representative branches of government through legislation and elections. *See* Valley Forge Christian College v. Americans For Separation of Church & State, 454 U.S. 464, 472 (1982). *See also* Warth v. Seldin, 422 U.S. 490, 499 (1975).

A creative twist in the diluted vote injury was made in McRae v. Matthews, 421 F. Supp. 533 (E.D.N.Y. 1976). In that case two United States Senators and one member of the House of Representatives sought to intervene in a suit challenging "the constitutional validity of one section of a correctly enacted law" for which they had voted. *Id.* at 540. They reasoned that a judicial determination of unconstitutionality would nullify their votes and that they had an interest in protecting those votes through intervention. The court recognized the right of a legislator to sue where the "right to sue derives from the legal injury done to the legislator's vote as integral to the process of enactment. The litigation is addressed to establishing the efficacy of the legislator's vote as a vote to be counted in the legislative process." *Id.* at 540 (citing Coleman v. Miller, 307 U.S. 433 (1939) and Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974)). The court found that the plaintiffs alleged no right to have their votes counted to any greater degree than had already been done. It also found that the plaintiffs did not allege that the enactment process was unlawful. *McRae,* 421 F. Supp. at 540.

The court was further concerned that granting standing "would involve accepting as a principle that each member of the Congress has an interest [in intervening] in every case in which the substantive constitutionality of a provision in a federal enactment . . . [or] . . . in which the interpretation of a federal statute [is] in question." *Id.* at 540 (citing Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973)). Like Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), *McRae* involved an actual vote already

In *Harrington v. Bush*,[86] *Sampson* was found to be inapplicable when the vote in question was not on specific legislation, but on appropriations to a general fund. Prong one could not be met because it could not be clearly shown that a vote was actually nullified.[87]

In summarizing the injury to past votes, cases such as *Sampson* and *Coleman* indicate that a legislator will be successful when the diminished vote is on specific legislation which the executive branch refused to enact in violation of the Constitution, or which the executive branch enacted illegally. Standing is granted because the legislator can show that a vote was actually cast and that the right to have it counted and given effect is within a zone of interests protected by the Constitution. Refusal to give the vote effect is an injury in fact suffered by the legislator which is traceable to the acts of the executive branch. When the court requires the executive

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cast. The court was correct in its result, but the reasoning could have more easily followed than in Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975) and Baker v. Carr, 369 U.S. 162 (1962), where it was held that once a bill is enacted, a legislator has no greater interest in its enforcement than does every citizen. This conclusion is further substantiated by the fact that the court granted the legislators standing in their capacity as citizens and taxpayers under Flast v. Cohen, 392 U.S. 83, 97. *McRae*, 421 F. Supp. at 540 (citing Flast v. Cohen, 392 U.S. 83, 102-03 (1968)). As legislators, there was not a sufficiently direct link between their status and the injury for purposes of the first prong of the test. As citizens and taxpayers, the status was sufficiently linked to the injury where an enacted law was not being effectuated.

86. 553 F.2d 190 (D.C. Cir. 1977).

87. The congressman alleged dilution of past and future votes. His past votes had been diminished because the Central Intelligence Agency might have been acting beyond its statutory grant. He wanted secret information released to determine whether or not the appropriations for which he had voted were being properly spent. *Id.* at 201, 203-04. The court refused to extend *Kennedy v. Sampson* to a situation involving past or future votes which did not involve specific legislation, or to a situation where a vote was not clearly nullified. *Id.* at 211. Additionally, the court found that if a vote had been effected, it was a vote which had not been denied enactment. Using the now familiar language on past votes for enacted laws, the court found that the congressman had no greater interest in enforcing the law than did every citizen. *Id.* at 213. *See also supra* note 85 and *infra* notes 124-35 and accompanying text.

The same panel also denied standing in Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977). In *Metcalf*, a United States Senator sought a declaration by the court that the National Petroleum Council and its subgroups were unlawfully functioning as congressional advisory committees because the members were selected in such a way as to create a biased view. The congressman alleged that his past votes had "been effectively nullified by the alleged lack of fair balance in membership of the NPC." *Id.* at 185. Citing Harrington v. Bush, 533 F.2d 190 (D.C. Cir. 1977), the court held, without discussion, that the "asserted injuries do not satisfy the Constitutional requirement of injury in fact." *Id.* This was an application of prong one analysis.

branch to enact the law, the legislator's injury is redressed. Such a factual situation satisfies both prongs of the modern test.

As illustrated by *Harrington*, the cases further indicate that a legislator will not be granted standing where the alleged diminished vote was on a law which has already been legally enacted by the executive branch. In such a case there can be no challenge to the enactment process. Once the law has been legally enacted, the legislator's interest in having the law enforced is no different than that of every other citizen. As a result, the court refuses to find that an injury, based upon the plaintiff's status as a legislator, has occurred. Prong one of the modern test requires that the plaintiff show just such a direct personal injury. In addition, a legislator will be unsuccessful in achieving standing when the vote alleged to have been diluted was on a legislative matter other than a specific law, such as a vote on appropriations. This injury is considered to be speculative because it is too difficult to show that a protected vote was clearly nullified. Prong one of the modern test requires that the injury be concrete. It is also often impossible to find a precise statute or constitutional protection for the vote. As a result, prong two of the test may also be a barrier. More specific guidelines in this area would be helpful so that legislators would know when sufficient facts existed to bring a case before the court.

The courts have been too narrow in interpreting the standing doctrine where the injured vote was for a law already enacted, or for appropriations where it can be shown a vote actually occurred. Legislators have an interest in protecting these votes from executive abuse. The practical effect of refusing to enforce or abide by a legislative vote is the same as refusing to enact a law for which a vote was cast. In both cases, the practical effect is the same: the vote is nullified.

2. *Future Votes*

The injury based on diluted vote has been handled differently by the courts, depending on whether the vote was one which had already occurred or one which was yet to be made. The allegation of an injury to a future vote as a basis for standing has generally been unsuccessful. Three cases are representative of injured future votes. In the first, standing was denied because no protected vote was found. The last two

were successful because the vote in question was protected either by a statute or the Constitution.

Holtzman v. Schlesinger[88] is an example of an unsuccessful attempt to get standing for injury to a future vote. A United States congresswoman challenged the authority of the President in sending military aircraft on bombing missions over Cambodia without congressional approval. The congresswoman alleged that her potential vote on such an approval was rendered ineffective by the President's acts. A divided court found that the congresswoman "had not been denied any right to vote on Cambodia by any action of the defendants. She has fully participated in the debates . . . . The fact that her vote was ineffective was due to the contrary vote of her colleagues."[89] In essence, with no actual vote losing its ef-

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88. 484 F.2d 1307 (2nd Cir. 1973). *See also supra* note 72 (discussing injury to a future vote in *Pressler*).

89. 484 F.2d at 1315. The case is of questionable value as precedent because the court ruled against the plaintiff on another threshold issue. *Id.* at 1308-12 (political question).

A similar analysis was made in that portion of Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977), dealing with the alleged diluted future vote. The court held that a member of the United States House of Representatives did not have standing to seek a judicial declaration that certain Central Intelligence Agency activities or funding methods were illegal. The congressman alleged two ways in which his future vote was diminished. First, his effectiveness to cast future votes on appropriations was diminished because of the alleged illegal secrecy surrounding the funding. Second, his potential vote on impeachment was also diminished without a determination of the legality of the defendant's behavior. The court found both injuries to be too speculative and too subjective. *Id.* at 202-03. It noted that no actual vote had been denied, and that access to the information was not granted by statute or the Constitution. The court could not find the necessary link between the defendants' alleged activities and the congressman's vote; therefore, the case lacked the necessary concrete adverseness to satisfy prong one. *Id.* at 212.

In a subsequent decision, the same court summarily found no standing for legislators alleging injury to their future vote in Metcalf v. National Petroleum Council, 533 F.2d 176 (D.C. Cir 1977). The *Metcalf* court relied exclusively upon its prior decision in *Harrington* to support its position. *Id.* at 185.

Reuss v. Balles, 584 F.2d 461 (D.C. Cir. 1978) was a situation similar to *Metcalf*. A United States Senator alleged that the method of appointing members to the Federal Open Market Committee of the Federal Reserve System was illegal. The method used prevented him from casting an impeachment vote against a committee member, thereby making members immune from congressional action. The congressman reasoned that his interest in such impeachment was within the zone of interests protected by the Constitution. U.S. CONST. art. I, § 2. Relying on *Kennedy* and *Coleman*, the court found that there was no dilution of any vote on specific legislation. The court also found the plaintiff's interest in any such impeachment based upon the Constitution to be no different than the interests of every citizen. 584 F.2d at 467-68. Neither prong of the modern test was met. For further elaboration on *Reuss*, see Note, *Standing—Congressman Denied Standing as Legislator and Bondholder to*

fect, there was no injury in fact. The congresswoman's vote was not protected by a statute. There was a Constitutional zone of interest protecting the right to vote on war, but the court found that the right to cast such a vote had not been denied by any act of the defendants.[90]

In 1979, in *Goldwater v. Carter*,[91] Senator Barry Goldwater and other congressmen challenged the President's termination of the mutual defense treaty with the Republic of China. The congressmen alleged that the Constitution required a two-thirds approval of the Senate or a majority of both houses of Congress to terminate a treaty. The President's action, therefore, deprived them of a right to vote. These facts involved specific legislation and there was a constitutional provision arguably protecting the senators' interests in their votes. The court found that "a live controversy exists in appellees' claim of an opportunity to cast a binding vote. The President's action has deprived them of this opportunity completely, in the sense that they have no legislative power to exercise an equivalent voting opportunity."[92]

Judges Wright and Tamm argued that the legislators did not have standing.[93] Faithful to Judge Tamm's earlier position in another legislator case,[94] Judge Wright argued that the congressmen had a claim no different from that of all citizens in seeing the leaders of the country act according to the Consti-

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Challenge the Composition of the Federal Open Market Committee—Reuss v. Balles, 584 F.2d 461 (D.C. Cir.), cert. denied, 99 S. Ct. 598 (1978), 52 TEMP. L.Q. 386 (1979).

90. *Holtzman*, 484 F.2d at 1315.

91. 617 F.2d 697 (D.C. Cir. 1979) (en banc). The decision has been the catalyst for considerable discussion especially in the area of treaties. *See Recent Developments, Jurisdiction: Political Questions—Goldwater v. Carter, ___ U.S. ___ (1979), 100 S. Ct. 533 (1979), 21* HARV. INT'L L.J. 567 (1980); Case Comment, *Goldwater v. Carter, 7* BROOKLYN J. INT'L. L. 111 (1981); Note, *Treaty Termination and the Separation of Powers: The Constitutional Controversy Continues in Goldwater v. Carter, 100 S. Ct. 533 (1979) (Mem.)* 9 DENVER J. INT'L L. & POLICY 239 (1980).

92. 617 F.2d at 705. *Contra* Edwards v. Carter, 580 F.2d 1055, 1056 (D.C. Cir. 1978) (considering even the standing decision in such a case to be premature). *See also* Note, *Congressional Power Under the Article IV Property Clause: Edwards v. Carter*, 50 U. COLO. L. REV. 527, 537 n.65 and accompanying text (1979)(criticizing the Court for denying *certiorari* creating the possibility that the appellate court decision may be treated as precedent in future decisions); Note, *Constitutional Law Treaty Power—Disposal of United States Territory—Panama Canal Treaties*, 1979 WIS. L. REV. 837.

93. 617 F.2d at 709.

94. *See* Reuss v. Balles, 584 F.2d 461 (D.C. Cir. 1978).

tution.[95] He also argued that, even if Congress had the exclusive power to approve treaty termination, no vote had been taken.[96] This would indicate that Judge Wright considers a diluted future vote never to be sufficient injury for standing purposes. Such a conclusion is irrational, however, because it would require Congress to initially cast a futile vote in order to protect what it considers to be its constitutional right to vote on treaties.

The critical difference between *Goldwater* and *Holtzman* is that in *Holtzman* the opportunity to cast future votes on the issue still existed after the defendant's actions, while in *Goldwater* the right to cast a future vote on the issue was found to have been entirely eliminated by the defendant's actions. A constitutionally protected vote was actually lost so that a concrete injury could be found which was within the zone of interests protected by the Constitution.

A future vote has also been found to be protected by statute. In *Williams v. Phillips,*[97] four United States Senators brought an action to remove the acting director of the Office of Economic Opportunity. The acting director was appointed by the President. The injury alleged was the loss of their statutorily protected right to vote for confirmation of the director.[98] Congress had expressly provided for senate approval[99] so that the senators' interests in protecting their votes fell squarely within the zone of interests protected by the statute.[100] If the court declared the executive acts illegal, the

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95. 617 F.2d at 709-10.

96. *Id.* at 712-13. *See also id.* at 711 n.3. The United States Supreme Court vacated the decision on the ground that it presented a political question. Goldwater v. Carter, 444 U.S. 996 (1980) (four justices argued that they would have granted standing).

97. 360 F. Supp. 1363 (D.D.C. 1973).

98. *Id.* at 1366.

99. *Id.* "[OEO] shall be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate." Economic Opportunity Act of 1964 § 601(a), 42 U.S.C. § 2941(a) (1970). The issue of diminished vote is never specifically mentioned by the court; however, since confirmation is made through the voting process, a loss of vote is inferred.

100. *But see* Reuss v. Balles, 584 F.2d 461, 466 n.15 (D.C. Cir. 1978) (questioning the holding). The most recent case alleging injury to a future vote is Federation for Am. Immigration Reform v. Klutznick, 486 F. Supp. 564 (D.D.C. 1980). Members of the House of Representatives challenged the legality of the census. They alleged that including illegal aliens in the census would diminish their vote. In a strained logic, they reasoned that because the aliens were counted for purposes of reapportionment, but could not vote in congressional elections, their chances of re-election and

plaintiffs would regain their vote and therefore have their injury redressed. With this argument, the plaintiffs were able to meet both prongs of the modern test.

As illustrated in the case of *Holtzman* the future vote injury can be particularly speculative and difficult to allege, especially where other voting alternatives exist. However, legislators have a valid interest in preventing the loss of their protected voting rights. If it can be shown that as in *Williams* and *Goldwater,* a specific future vote has been lost which is within the zone of interests protected by either the Constitution or a statute, and that no equivalent voting alternative exists, the court should grant standing. In this way, the courts take an active role in maintaining the necessary checks and balances between competing political interests within the government.

B. *Usurpation Of Legislative Power*

Claims of usurpation of legislative power are closely related to those of a diluted vote. In fact, the two are often alleged together, particularly where the lost vote is a future vote rather than a past one.[101] Because legislative power is almost always a form of voting, the two injuries are often indistinguishable and should therefore be merged. In the usurpation of power argument, the legislator will usually attempt to show that a constitutional or statutory duty, other than voting, has been denied due to the defendant's acts. Such a showing, it is argued, would satisfy both prongs of the modern test. The following case is illustrative.

In *Gravel v. Laird,*[102] two members of the United States Senate and twenty members of the House of Representatives sought to have the military activities in Southeast Asia declared unlawful. They alleged that only Congress had the constitutional authority to declare war, and that the military op-

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their resulting ability to vote, was diminished or threatened. The court found this injury too speculative and that the plaintiffs had "failed to demonstrate that the relief they request[ed] [would] benefit them personally." *Id.* at 570-71. The congressmen therefore failed to establish injury in fact or to satisfy the redressablility showing of prong one.

101. *See* Reuss v. Balles 584 F.2d 461 (D.C. Cir. 1978) (discussed in *supra* note 89); Pressler v. Blumenthal, 434 U.S. 1028 (1978) (discussed in *supra* note 72).

102. 347 F. Supp. 7 (D.D.C. 1972).

erations were being carried on without such a declaration.[103] Congressional power was therefore usurped and they were injured. The usurped power was remarkably like the lost potential vote in *Holtzman;* the injury, however, was not labeled a voting injury. The court's analysis of standing was quite similar to that in *Holtzman:* "[the plaintiffs have not] shown sufficiently that the action they challenge has caused them [individual] injury in fact . . . ."[104] The plaintiffs failed to satisfy prong one of the modern test.

A better case would have existed if the President had personally declared war. The plaintiffs could then have argued that a designated power of Congress to create legislation had been usurped and no alternative means to act on the issue existed. This would present a case with facts nearly identical to those in *Goldwater* and *Williams* where standing was found to exist.[105] Again, the only difference between *Gravel* and the two successful future voting cases is that the usurped power was not alleged as being a voting power. Such an allegation of lost future vote seems to be the next logical step in this argument.[106] For this reason, it is suggested that the theory of

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103. *Id.* at 8.

104. *Id.* at 9. *Cf.* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1977) (limiting the nexus test to taxpayer suits).

105. *Compare* Holtzman v. Richardson, 361 F. Supp. 545 (E.D.N.Y. 1973). A United States congresswoman made allegations similar to those in *Gravel. Id.* at 549 (citing U.S. CONST. art. I, § 8). The court found that as "a Congresswoman, plaintiff is called upon to appropriate funds for military operations, raise an army, and declare war." 361 F. Supp. at 546. The plaintiff was also defined as "a member of a narrowly defined group, which has been more directly affected by the conduct in question than has the general population . . . . " *Id.* The case was reversed on other grounds however. *See* Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973). *Cf.* Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) (finding congressmen in a similar situation had no unique interest not shared equally by all citizens). The duties, protected by the Constitution, which she was unable to perform, provided the necessary nexus for both *Flast* tests. *Cf.* Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1977) (limiting the nexus test to taxpayer suits).

106. The cases likewise merge the language and reasoning of the two injuries. *See* Daughtery v. Carter, 584 F.2d 1050 (D.C. Cir. 1978). In *Daughtery,* congressmen challenged the legality of the Presidential pardon of those who violated selective service laws during the Vietnam War. The congressmen alleged that the terms of the pardon, which included reinstatement of full voting rights, violated the Immigration and Nationality Act. 8 U.S.C. §§ 1101-1503 (1976). They did "not contend that they actually voted for the legislation that is the subject of [the] suit." 584 F.2d at 1057. Instead, they alleged that the "President has usurped their power to enact repealing legislation . . . ." *Id.* The court found that the "failure or refusal of the executive branch to execute *accomplished* legislation does not affect the legal status of such legislation, nor does it invade, usurp or infringe upon a congressman's power to make

usurpation of power be eliminated entirely as a separately articulated injury. Instead, legislators should be required to trace the usurpation to a specific vote, and allege loss of that future vote as the injury suffered. This would result in a merging of the usurpation of power injury with the diluted future vote injury.[107]

C. *Diminished Effectiveness Absent a Judicial Declaration*

Legislators have been somewhat successful using a third

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law." *Id.* (emphasis added). "The injury suffered by the congressional appellants is in no way unique to their status as legislators." *Id.* at 1057-58. This is the familiar language for cases involving past votes and enacted law but is here applied to the usurpation of power injury.

107. Three additional cases in this area are worthy of noting. In Korith v. Briscoe, 523 F.2d 1271 (5th Cir. 1975), a member of the Texas State Legislature alleged that the exclusive power of the Congress to make treaties had been usurped by an agreement between the State of Texas and Mexico. The court could find no connection between the plaintiff's status as a state legislator and the injury suffered. *Id.* at 1278 (relying on U. S. CONST. art. I, § 10, cl. 182). None of the legislator's votes or "any other legislative power" had been impeded. 523 F.2d at 1278.

Reuss v. Balles, 584 F.2d 461 (D.C. Cir. 1978), is another example of a case involving both an allegation of a diluted vote and a usurpation of congressional power. The congressman alleged that an "improper delegation of responsibilities to the FOMC resulted in an usurpation of his powers" under the Constitution. *Id.* at 465. The Court found that even if the congressman were given the relief sought, the "responsibilities currently delegated to the FOMC would remain so delegated . . . and the fact [the congressman's] role vis-a-vis monetary policy would in no way be enhanced by such a declaration indicates that his legislative powers . . . are not currently adversely affected in any respect." *Id.* Although there was an injury in fact—usurpation of the congressman's duty—and the congressman's interests were within the zone of interests protected by the Constitution, he failed to satisfy the additional prong one requirement of redressability.

Brown v. Ruckelhaus, 364 F. Supp. 258 (C.D. Cal. 1973), is a difficult case to classify but seems to best fit this category. A United States Congressman alleged that the Environmental Protection Agency had exceeded its statutory authority by impounding congressionally appropriated funds earmarked for waste treatment facility construction. It can be inferred from the case that the congressman had voted on the appropriations and made proposals to the EPA for construction projects in his state. *Id.* at 260. The court held that he lacked standing, however, because of his failure to show that the impounding had injured him directly. The court noted that a direct injury from such impounding of funds had been found in other cases. *Id.* at 262. No proof was offered "indicating that proposals have been rejected because of frozen funds . . . . [W]e find this omission fatal. There is no proof that any act by the President or the EPA has hurt, is injuring, *or will impair* . . . Congressman Brown." *Id.* at 264 (emphasis added). It would appear, although not articulated thoroughly by the court, that the plaintiff failed to show injury in fact or to place himself in the zone of interests protected by any statute or the Constitution. The court also found that the EPA was not compelled to spend all the authorized funds, and hence it did not usurp any congressional authority by the impoundment. *Id.*

argument to invoke judicial intervention. When a legislator can show that legislative effectiveness in carrying out a statutory or constitutional duty will be impaired in the absence of a judicial decision, the courts will sometimes involve themselves. The court is usually asked to rule on one of two problems: which conflicting constitutional interpretation is correct,[108] or whether the actions of a government official are legal. A ruling on an official action would aid the legislator, for example, in effectively exercising legislative impeachment powers.[109] This level of judicial participation has been strongly criticized by some courts.[110] Legislative effectiveness in this sense does not directly involve voting or a usurpation of power, but a broader decision making process.

This injury should be eliminated as a basis of standing for two reasons. First, it is very subjective and speculative. Second, it has been used most successfully where a legislator needs the court's decision to consider impeachment on the ground that the defendant's actions are illegal; yet, every citizen may consider impeachment of an elected official. In this sense a legislator's interests in impeachment are not unique. Similarly, initiatives, recalls, and other alternatives are available for impeaching officials. As a result, legislators have no unique interest in such a determination by the court. The only exception to this general elimination of diminished effectiveness would be an instance where a clearly irreconcilable split in constitutional interpretation existed within a legislative body. Judicial intervention could then be justified as a matter of judicial and legislative economy, as well as part of the historical role of the federal courts.

1. *Resolution of Conflicting Constitutional Interpretations*

Trombetta v. Florida[111] is an example of legislators requesting constitutional interpretation. The Florida Legislature was considering ratification of an amendment to the United States Constitution.[112] A provision in the state consti-

108. *See* Trombetta v. Florida, 353 F. Supp. 575, 576 (M.D. Fla. 1973).

109. *See* Harrington v. Bush, 553 F.2d 190, 198 (D.C. Cir. 1977).

110. *Id.*

111. 353 F. Supp. 575 (M.D. Fla. 1973).

112. The legislature was considering ratification of the twenty-seventh amendment. *Id.* For the full text of the amendment, see *infra* note 139.

tution required that a majority of the legislators voting for such an amendment be elected after the proposed amendment was submitted to the state for ratification.[113] As a result of this provision, a favorable vote for the amendment would be frustrated. The legislators sought a determination of the constitutionality of the provision. The court, in granting the legislators standing, stated that their membership in the legislature gave them:

> [A] direct responsibility and involvement in the constitutional ratification process not shared by the citizenry or electors of the state at large. The very issue now presented to the [C]ourt, therefore, placed the plaintiffs on the horns of an unresolved constitutional dilemma giving them "such a present stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends for illumination of difficult constitutional questions."[114]

In *Dyer v. Blair*,[115] members of the Illinois state legislature brought an action seeking a declaration that a provision of the state constitution was unconstitutional. The provision required that a super-majority vote of each house of the legislature was necessary to pass a resolution ratifying an amendment to the United States Constitution. The Court found that such a super-majority requirement was lawful and a matter that each state determine itself.[116] The plaintiffs were found to have standing under *Coleman v. Miller* and *Baker v. Carr*. The court, however, dealt with the issue by footnote only.[117] In *Dyer*, a vote had already been taken but no injury to past vote was alleged. Both *Trombetta* and *Dyer* present a problem similar to that in *Coleman*. The emphasis is more on the plaintiff's interest in the outcome than on an injury. Since the outcome is determined by an interpretation of the Constitution, the plaintiff's interests fall squarely within the article III limitations on federal court jurisdiction. The process for amending the Constitution of the United States is at issue and is of such importance that a judicial grant of standing to

113. FLA. CONST. art. X, § 1 (1968).
114. 353 F. Supp. at 576 (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).
115. 390 F. Supp. 1291 (N.D. Ill. 1975).
116. *Id.* at 1306.
117. *Id.* at 1297 n.12.

hear the issues is justified both practically and constitutionally.

2. *The "Bears Upon" Standard of Diminished Effectiveness*

A much different situation exists where the legislator seeks a judicial declaration because his effectiveness may be influenced in a more general, subjective way. As noted previously, this situation usually involves potential impeachment of a public official by the legislative branch.

This injury, as a basis for standing, created a split in the circuit courts by 1973. In *Mitchell v. Laird*,[118] thirteen members of the United States House of Representatives sought an injunction to stop U.S. military activities in Indochina. They also sought a declaration that the activities were unconstitutional. Such a declaration, they argued, would aid them in deciding whether or not to impeach the President.[119] In what may well be the most concise test for an injury to a legislator's effectiveness, the Court of Appeals for the District of Columbia stated:

> A declaration to that effect would bear upon the duties of

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118. 488 F.2d 611 (D.C. Cir. 1973). *See Recent Decisions, Constitutional Law—Standing of Members Of Congress To Challenge Executive Action In The War In Indo-China—Mitchell v. Laird*, 33 MD. L. REV. 504 (1973). *See also*, Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir.), *rev'g*, 361 F. Supp. 541 (E.D.N.Y. 1973). The congresswoman argued that a declaration that the President's actions were illegal would bear upon her duty to consider impeachment. The court noted, however, that the issue was nonjusticiable: "[a determination of the fact that the] establishment of the illegality here would be relevant in possible impeachment proceedings against the President would in effect be asking the judiciary for an advisory opinion which is precisely and historically what the 'case and controversy' conditions . . . forbid." 484 F.2d at 1314. *Cf.* Judge Oake's dissent. *Id.* at 1315-18. In addition to finding that the congresswoman's voting right had been injured, the district court had also held that the "plaintiff [had] a continuing responsibility to insure the checks and balances of our democracy through the use of impeachment." 361 F. Supp. at 449. The appellate court effectively negated any injury to the congresswoman's duties, despite the logical appeal of her argument.

119. The court first refused to find the issue moot because the hostilities were purportedly halted:

> [A] declaratory judgment respecting past action might have legal import, inasmuch as though this point is not specifically pleaded, plaintiffs have a duty under the Constitution to consider whether defendants in continuing the hostilities did commit high crimes and misdemeanors so as to justify an impeachment of the individual defendants, pursuant to the United States Constitution . . . ."

488 F.2d at 613.

> plaintiffs to consider whether to impeach defendants, and upon plaintiffs quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities . . . . In our view, the considerations are sufficient to give the plaintiffs a standing to make their complaint.[120]

This case established the "bears upon" standard which allows standing in any case in which a legislator can allege that a judicial determination is necessary because it would bear upon the decisions necessary to carry out legislative duties.[121]

In *Holtzman v. Schlesinger*,[122] the Second Circuit found similar injuries to be inadequate to support standing. Additionally, the court found that the request for such a judicial determination was in essence a request for an advisory opinion.[123]

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120. *Id.* at 614 (citing, among other cases, Data Processing Serv. Org., Inc. v. Camp, 379 U.S. 150 (1970)).

121. *See also Judicial Decisions, War—Constitutionality of War in Indo-China—President's Power To Continue Hostilities—Whether Formal Declaration of War Necessary—Political Question*, 67 AM. J. INT'L L. 787 (1973).

Nader v. Bork, 366 F. Supp. 104 (D.D.C. 1973) was the final decision on legislative standing by a District of Columbia court in 1973. Three members of Congress sought a declaration that the discharge of Watergate Special Prosecutor, Archibald Cox, was illegal. The court noted the unusual circumstances in Congress surrounding the Watergate proceedings: "[n]umerous bills are pending in the Senate and the House of Representatives which attempt to insulate the Watergate inquiries and prosecutions from Executive interference, and impeachment of the President because of his alleged role in the Watergate matter . . . ." *Id.* at 106 (quoting Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973)). The court held that "the standing of the three congressional plaintiffs to pursue their effort to obtain a judicial determination as to the legality of the Cox discharge falls squarely within the recent holding [of *Mitchell*] . . . ." 366 F. Supp. at 106.

122. 484 F.2d 1307 (2d Cir. 1973) (discussed *supra* note 118). *See also supra* text accompanying note 88.

123. *Id.* at 1315. A similar conclusion was reached in Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975). Four congressmen sued for a declaration that U.S. military activities in Southeast Asia were illegal. The question for determination was whether the alleged constitutional actions by the executive branch, as well as alleged statutory violations, were illegal. The relevant statute reads:

> None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam . . . by the United States forces, after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose[s].

Pub. L. No. 93-50, § 307. Additionally, a second statute provides:

> Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Viet-

The District of Columbia Circuit subsequently adopted a similar view, in *Harrington v. Bush*,[124] which resolved the circuit court conflict. A unanimous court rejected the "bears upon" standard of *Mitchell* as being insufficient to support standing and as being contrary to the article III limitations. The court considered the "bears upon" standard of injury as too subjective: "Since there are no allegations of particular injury, appellant's claim with respect to the relevance of a declaratory judgment to his congressional duties must fail."[125] The fact that the "bears upon" standard also involves a future injury, rather than an actual one, further weakened its ability to help a plaintiff show the necessary "concreteness of the controversy,"[126] required by prong one. The court pinpointed the ultimate weakness of the "bears upon" theory: "This test lessens the strength of the necessary connection between the complaining party and controversy which he seeks to have adjudicated . . . . Therefore, we conclude that the 'bears upon' language and the notion it imports are inconsistent with the constitutional requirement of injury in fact . . . ."[127] The court noted, as to the alleged illegal activities, that the congressman relied solely on *Mitchell* in defining his interests in impeachment.[128] The congressman claimed that a judicial declaration would " 'bear upon' his duties and rights 'to consider, initiate, support or vote for the impeachment of the defen-

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nam, South Vietnam, Laos or Cambodia.

Pub. L. No. 93-52, § 108. No specific diminution of effectiveness was alleged. The court relied on *Holtzman* to find that the plaintiffs sought an advisory opinion. 528 F.2d at 459. As for interpreting the statutes, the court found that because differences in interpretation existed in Congress itself, that "if there is a difference . . . Congress has the resources through its committees to ascertain the facts. With facts before it, it may tighten statutory restrictions." *Id.* *See also* Note, *supra* note 51, at 1638.

124. 553 F.2d 190 (D.C. Cir. 1977).

125. 553 F.2d at 208. *See also id.* at 209 n.99.

126. *Id.* at 208. The court also criticized *Mitchell* for going to the standing question unnecessarily. Because the *Mitchell* court found the questions in the case to be nonjusticiable, any decision on standing was purely dicta. *Id.* at 207. Ironically, the court in *Harrington v. Bush* made a similar mistake in its interpretation of the standing doctrine: "the inquiry into the existence of injury is the crucial inquiry; if it is determined that no injury exists, there is no need to pose or answer the other inquiries in the case law." *Id.* at 205 n.68. Since the court found the plaintiff to have failed to allege an injury in fact, any discussion of the "other inquiries in the case law" would be dicta. With regard to such inquiries, the court discussed the causation requirement and the redressability requirements of standing. *Id.* at 208-09.

127. *Id.* at 209.

128. *Id.* at 198, 207.

dants . . . .' "[129]

The court made two important observations with regard to the "bears upon" standard and the plaintiffs' allegations: first, the plaintiff did not allege that the judicial determination would force him to take impeachment action; second, he did not allege how he would benefit in any way from such a declaration.[130] As to the first observation, the court found that the alleged illegal acts "are not linked with any degree of specificity to the appellant's Congressional interests. The essence of the injury in fact concept is the frustration of some right or interest."[131] About the second observation, the court stated: "appellant claims no particular interest in the outcome and it appears either result would serve his asserted need for information . . . ."[132] This lack of a personal stake in the outcome "weakened [the] relationship between the party and the controversy."[133] The result of this weakness was a "transforming of a complaint for declaratory [judgment] into an advisory opinion."[134]

Besides heavily undermining *Mitchell,* the holding in *Harrington v. Bush* created doubts as to whether a congressman could ever again rely on the "diminished effectiveness" or "bears upon" theory for standing. The court did acknowledge, however, that such a case might still exist: "We do not hold that a Congressman may never seek a declaratory judgment of executive illegality, but that such a request must be accompanied by allegations of particular concrete injury . . . ."[135]

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129. *Id.* (quoting the complaint).

130. *Id.* at 200.

131. *Id.* at 208.

132. *Id.* at 209.

133. *Id.*

134. *Id. See also* Comment, *supra* note 8, at 1376-78.

135. 553 F.2d at 210. *See also* Hall v. Siegal, 467 F. Supp. 750 (S.D. Ill. 1977). *Hall* involved Illinois State Legislators who sought to enjoin defendants from alleged illegal lobbying. The injury was not actual but "clearly threatened because of actions and admissions thereof by defendants with respect to legislators in other states." *Id.* at 753. The extent of the injury was the lobbying itself as well as the fact that the "visits and telephone calls to legislators by defendants [would] absorb substantial time and energy which they should be devoting to the interests of their own constituents." *Id.* The legislators were also found to have interests which fell within the zone of interests protected by a state law prohibiting such lobbying. *Id.* This case represents the first time legislators alleged an interruption of their duties as a ground for diminished effectiveness. Although applicable, the plaintiffs did not allege that the lobbying "bears upon" their effectiveness or performance of these duties.

While the "bears upon" argument is an honest attempt by legislators to determine how most to effectively carry out their legislative duties, it is simply too subjective to survive the standing tests. Absent an important need for interpreting a constitutional provision, the courts have been wise not to intervene when a legislator needs a judicial declaration simply to help carry out legislative duties. While considering impeachment important, the proceedings can go on without the courts. Additionally, a court decision which would aid the legislator might occur anyway, but only because specific charges had been made against the individual who is subject to impeachment.

IV. STANDING IN THE ERA CASE: *Idaho v. Freeman*

The recent case of *Idaho v. Freeman*[136] involved four state legislators from Washington who intervened in a case initially brought by state legislators from Idaho and Arizona. In addition to suing in their capacity as individual legislators, the Idaho and Arizona legislators also sued in a relator action. As a result, the legislature of each state was a named party as was the leadership of each house in both legislatures.[137] Argu-

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Standing, for those alleging diminished effectiveness, continued its decline with Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977). The congressman alleged that "until the legal issues surrounding the operation of the NPC are resolved by a federal court, he 'is uncertain how best to take effective legislative action to correct the illegalities he perceives.' " *Id.* at 185 (quoting Brief for Appellant at 29). Relying on *Harrington v. Bush*, the court dismissed this claim for failure to allege an injury in fact. The congressman further alleged that "the imbalance of the NPC has caused him injury to his committee work in the senate," 553 F.2d at 185 because the NPC, through its subcommittees, provides information to senate committees of which the congressman is a member. Specifically, he alleged that he "is impeded in his efforts to develop the best possible legislative product." *Id.* at 185-86. He conceded, however, that he had other sources of information. The court found this insufficient to confer standing, stating: "[w]e conclude that there has been no judicially cognizable injury stated. This conclusion flows from the fact that appellant has alleged no 'particular concrete injury' which amounts to a 'claim of specific present objective harm or threat of harm.' " *Id.* at 187-88. The injury was also called too speculative. *Id.* at 188.

136. 529 F. Supp. 1107 (D. Idaho 1981); Carmen v. Idaho, 103 S. Ct. 22 (1982).

137. *Id. See also* Plaintiffs' Complaint For Declaratory And Injunctive Relief. This case might very well represent "the first time an article V case has ever been brought on behalf of a *legislature*, a specifically named entity in article V." Letter from Maxwell A. Miller, Senior Attorney, Mountain States Legal Foundation, Denver, Colorado (October 18, 1982) (emphasis added). Copy on file with the offices of Santa Clara Law Review [hereinafter referred to as Miller Letter]. Article V, in pertinent part, may be found *infra* note 138.

ing that their votes were within the zone of interests protected by article V of the Constitution,[138] the plaintiffs sought a declaration that the votes rescinding prior ratification of the Equal Rights Amendment were valid and effective; that the seven-year Congressional extension of the ERA ratification period was unconstitutional; and that the running of the first seven-year ratification period terminated all state ratifications which occurred prior to the day on which the seven-year period ended.[139] The plaintiffs further sought an injunction requiring the defendant[140] to remove the state of Idaho's name from all documents indicating the names of states ratifying the ERA. Additionally, the plaintiffs sought an injunction enjoining the defendant from counting toward ratification any purported state ratifications which took place after the seven-year limit expired.[141]

The author acknowledges his gratitude to Mr. Miller, and to Mr. Roger Marzulla, past President and Chief Legal Officer of Mountain States Legal Foundation, for their assistance in preparing this comment.

138. Article V provides, in pertinent part, that:

> The Congress, whenever two-thirds of both houses shall propose amendments to this Constitution, or on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, *when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other mode of Ratification may be proposed by the Congress* . . . .

U.S. CONST. art. V (emphasis added). Nearly every significant part of article V has been dealt with by the courts. *See* National Prohibition Cases, 253 U.S. 350, 386 (1920) ("whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments . . . ."); Dillon v. Gloss, 256 U.S. 368 (1921) ("which . . . shall be valid to all Intents and Purposes, as part of this Constitution"); Dyer v. Blair, 390 F. Supp. 1287, 1308 (N.D. Ill. 1974) ("ratified"); Hawke v. Smithe, No. 1, 253 U.S. 221 (1920) ("Legislature"); United States v. Sprague, 282 U.S. 716 (1931) ("one or the other mode of Ratification may be proposed by the Congress").

139. The proposed twenty-seventh amendment, known as the Equal Rights Amendment, is set out below:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Section 3. This amendment shall take effect two years after the date of ratification.

H. J. RES. 208, 86 Stat. 1523 (1972) [hereinafter cited as ERA].

140. The defendant was the Administrator of the General Services Administration. Idaho v. Freeman, 529 F. Supp. 1107, 1111 (D. Idaho 1981).

141. *Id.* Ripeness and political question were also issues. *Id.* at 1111, 1116. The court correctly noted that finding against the plaintiffs on any justiciability issue

Since the court concluded that the individual legislators from Idaho had alleged injuries which encompassed all of the issues alleged by the other plaintiffs, the court discussed only the Idaho plaintiffs.[142] The injuries the Idaho plaintiffs alleged fell into the diminished vote category. As the court stated: "The basis for the Idaho legislators' claim of standing in this suit is that as participants in the ratification process, *their individual votes,* in favor of ratification for the seven-year time period or for the rescission of the prior ratification *have been debased* by the actions of the defendant . . . ."[143]

The Idaho plaintiffs' votes also fit neatly into the diminished vote category because the vote for rescission was actual, not prospective.[144] The votes related to specific legislation, and were not merely votes for appropriations.[145] Both of these factors have been decisive in allowing standing. In *Kennedy v. Sampson,*[146] a nullification of such a specific, actual past vote was found to fulfill the injury in fact requirement.[147]

The *Freeman* court relied on *Data Processing* to determine standing:

> The refusal to recognize the plaintiffs' act of rescinding

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would preclude its consideration of the others. *Id.* at 1116. For purposes of this discussion, which attempts to apply the tests of standing for legislators as previously outlined, it will be assumed that the other justiciability challenges have been met by the plaintiffs.

142. *Id.* at 1121. In his letter, Mr. Miller observes that in only finding standing for the Idaho plaintiffs, the court kept two issues before it: first, the issue of recission, and second, the issue of ratification limited to the initial seven-year period only. In Mr. Miller's words, "standing on one issue moots the necessity for finding standing on another." Miller Letter, *supra* note 137. He further asserts that "[s]tanding to raise the extension issue would have resided, if at all, in the Arizona plaintiffs." *Id.* Mr. Miller speculates that the court found standing on both issues so that it could, in the alternative, reach the merits of each. *Id.*

143. *Freeman,* 529 F. Supp. at 1118. (footnotes omitted) (emphasis added).

144. *Id.* at 1114.

145. "In February of 1977 the state legislature of Idaho took action to rescind its prior ratification of the proposed Equal Rights Amendment . . . . Thus, by a simple majority Idaho declared its prior ratification 'rescinded, voided, repealed, withdrawn, recalled and disaffirmed . . . .'" *Id.* at 1113-14 (footnotes omitted) (corrections in the original).

146. 511 F.2d 430 (D.C. Cir. 1974) *See supra* notes 73-76 and accompanying text.

147. *See supra* note 77 and accompanying text. *See also* Bordallo v. Camacho, 520 F.2d 763 (9th Cir. 1975); Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Metcalf v. National Petroleum Council, 553 F.2d 176 (D.C. Cir. 1977). The appropriateness of this portion of the *Kennedy v. Sampson* decision was reaffirmed by the court in *Harrington v. Bush.*

> the prior ratification as fully and completely retracting the prior expression impinges on the legislator's right to participate in the ratification process and gives rise to a cause of action. The plaintiffs in this instance have established direct injury in fact . . . .[148]

The legislators' interests in their votes were found to be protected by the zone of interests protected by article V of the Constitution,[149] as required by prong two of the modern test. The court found that "the plaintiffs here are specially empowered under article V to participate in the amendment process."[150] It went on to hold that the injuries suffered were part of plaintiffs' constitutionally protected interest of participating in the process of amending the Constitution and thus that the first bar to standing had been met. The court correctly relied on *Coleman v. Miller*[151] for this portion of the standing test.[152] The plaintiffs in *Coleman* were also state legislators voting to amend the Constitution.[153]

In applying the other elements of prong one, the *Freeman* court held that the plaintiffs' injuries were not equally shared by all citizens,[154] and that the injury could be traced to the acts of the defendants.[155] Finally, the court found that plaintiffs met the redressability requirement: "It is clear that the plaintiffs' alleged injury can be redressed by a declaration by the Court regarding the constitutionality of the various acts of rescission and extension."[156]

With regard to the legality of the extension of the ERA ratification period, the plaintiffs' injury should have also been alleged to have been a lost voting opportunity, or lost prospective vote. The extension would be viewed as a whole new part of the amendment process which the states were entitled to approve through a second vote. The court did not discuss the issues in this manner, nor did plaintiffs allege it in this way.[157]

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148. 529 F. Supp. at 1120-21.

149. *See supra* note 138 for the text of article V.

150. 529 F. Supp. at 1120.

151. 307 U.S. 433 (1939).

152. 529 F. Supp. at 1119.

153. Coleman v. Miller, 307 U.S. 433 (1939).

154. 529 F. Supp. at 1120. Lack of such a finding has been sufficient to deny standing. *See supra* note 37 and accompanying text.

155. 529 F. Supp. at 1121 (this satisfied the causal requirement).

156. *Id.*

157. *See* Brief for Plaintiffs at 37, Idaho v. Freeman, 529 F. Supp. 1107 (D.

The plaintiffs argued, instead, that the extension voided all previous ratification votes since it was not a part of the original ratified proposal. Failure to recognize this nullification was a failure to give the intended effect to the past votes which the plaintiffs cast: approval of the ERA as originally submitted to the states, including the time limitation for ratification. The injury in fact resulting from the extension is identical to the injury from the rescission not being recognized. In either case, a past vote is not given its proper effect.

The lost prospective vote argument would stem from the theory that the plaintiffs had been denied a constitutionally protected voting privilege involving specific legislation. The plaintiffs would argue that the extension was a modification of the initial proposal, and therefore as a new amendment it must also be submitted to the states for approval. Congress, in essence, sidestepped the article V requirement of submitting this new amendment to the states. Under this theory, plaintiffs could have come under the voting case of *Williams v. Phillips*,[158] where standing was found. The satisfaction of the zone of interests of prong two, as well as the redressability[159] and causation tests, would have remained the same for either type of vote.[160]

Additionally, the prospective vote analysis would ultimately have led the plaintiffs to allege usurpation of the legislators' effectiveness, even though it has been argued that the two theories should be merged. Plaintiffs could have argued, as was done in *Gravel v. Laird*[161] and *Goldwater v. Carter*,[162] that their constitutionally protected right to ratify the modified amendment had been usurped by the refusal of Congress

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Idaho 1981).

158. 360 F. Supp. 1363 (D.D.C. 1973). *See supra* notes 97-100 and accompanying text.

159. *See supra* note 72.

160. *See supra* text accompanying notes 154-56. Mr. Miller argues, perhaps correctly, that the prospective vote injury implies the right of legislatures under article V to cast a "negative vote" on the revised amendment, a right not necessarily within the rights given the states under article V. Miller Letter, *supra* note 137. This author would argue, as pointed out earlier, that the modification of the amendment created a new amendment which required new ratification by all states. This theory does not view the voting on the extension itself as one the states possess, but the voting on a heretofore totally unratified new amendment. Article V requires a positive vote here.

161. 347 F. Supp. 7 (D.D.C. 1972). *See supra* text accompanying notes 102-05.

162. 617 F.2d 697 (D.C. Cir. 1979) (en banc). *See supra* text accompanying notes 91-96.

to present it to the states for a vote. Because the redressability requirement was met, results such as those in *Brown v. Rucklehaus*[163] and *Reus v. Balles*[164] would not occur.

The case contained nearly all the necessary elements for standing based upon the diminished effectiveness injury. The missing element was a legislator from a state which had not yet voted on the amendment. Such a plaintiff would need a declaration by the court on the constitutionality of the extension. Likewise, a legislator from a state which was considering rescission could also ask for a determination of whether rescission was possible under the Constitution. Both of these would meet the *Coleman v. Miller*[165] test and the problems they presented would have been substantially like those of *Trombetta v. Florida*[166] and *Dyer v. Blair*.[167]

While the court considered the Arizona legislators' claims to be encompassed by those of the Idaho plaintiffs,[168] it is arguable that the Arizona legislators suffered the injury of diminished effectiveness while legislators from Idaho did not. The Arizona Legislature had considered the ERA amendment throughout the original seven-year period and had consistently voted against ratification.[169] Absent a declaration by the courts as to the constitutionality of the extension, the legislature could not effectively consider ratification during the extension period. The Arizona plaintiffs alleged, instead, that their past votes against the amendment were not given effect, an allegation which allowed the court to view their injury as being identical with that of the Idaho plaintiffs.[170] Under this argument, the Arizona votes helped defeat the amendment by preventing its passage during the original seven-year period.

The Supreme Court, unfortunately, found the issues in *Freeman* to be moot because the second ratification period had lapsed without the necessary number of states voting for

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163. 364 F. Supp. 258 (C.D. Cal. 1973). *See supra* note 107.

164. 584 F.2d 461 (D.C. Cir. 1978). *See supra* note 67 and accompanying text. *See also supra* note 107.

165. 307 U.S. 433 (1939). *See supra* notes 69-72 and accompanying text.

166. 353 F. Supp. 575 (M.D. Fla. 1973). *See supra* text accompanying notes 111, 114.

167. 390 F. Supp. 1291 (N.D. Ill. 1975). *See supra* text accompanying notes 115-17.

168. *See supra* text accompanying note 142.

169. Brief for Plaintiffs at 11.

170. *Id.* at 11-14.

ratification.[171] Had it reached the question of standing, it should have found that the plaintiffs met the necessary standing requirements. Because the ERA has been resubmitted to the states in identical form, it is very likely that the issues in *Freeman* may again be raised.

V. CONCLUSION

Allowing individuals to sue based on injuries suffered because of their special status as legislator serves an important political and social function. The standing tests used in these cases are as complex and frustrating as the law of standing is in general. The tests for legislator standing should be improved.[172] Injury to a vote should be expanded to allow standing for a lost future vote whenever a legislator can reasonably show that the voting right is in fact lost, and that the right to cast the vote is protected. Ursurpation of legislative power should be merged with the future vote injury, and standing should be allowed when the future vote test is met. The "bears upon" standard should not be revived because of the inherent ambiguity in the test itself. The legislators should institute impeachment proceedings, rather than asking for judicial intervention through declaratory relief. However, where a judicial declaration is necessary to settle a difference in constitutional interpretation within or between branches of government, the courts should, as a matter of expediency, step in as the ultimate interpreters of the Constitution.

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171. Carmen v. Idaho, 103 S. Ct. 22 (1982).

172. See Note, *supra* note 18, for an alternative solution to the standing confusion.